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No. 58

No. 59

In the Supreme Court of the United States

October Term, 19

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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 947

GENERAL MADISON PEARSON, POST COMMANDING OFFICER, FORT DIX, NEW JERSEY, PETITIONER

v.

UNITED STATES EX REL. HARRY HOROWITZ

No. 948

GENERAL MADISON PEARSON, POST COMMANDING OFFICER, FORT DIX, NEW JERSEY, PETITIONER

v.

UNITED STATES EX REL. JACOB S. SAMUELS

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of the petitioner, prays that writs of certiorari issue to review the judgments of the United States Circuit Court of Appeals for the Third Circuit, entered November 15, 1945 (No. 947, R. 48, 51; No. 948, R. 68), ordering respondents discharged from military custody on the ground that they were illegally classified by the Selective Service System.

OPINION BELOW

The opinion of the circuit court of appeals in these cases (No. 947, R. 47–48; No. 948, R. 67–68) is reported at 151 F. 2d 801.

JURISDICTION

The judgments of the circuit court of appeals were entered November 15, 1945 No. 947, R. 48; No. 948, R. 68). On February 12, 1946, Mr. Justice Burton extended the time for filing petitions for writs of certiorari in both cases until March 17, 1946. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Respondents claimed exemption from military service as students preparing for the ministry. Before finally classifying them their local boards referred their cases to an advisory panel on theological classifications (which was established by the New York City Selective Service Headquarters) for an advisory recommendation, which the boards thereafter considered together with all the other evidence in respondent's selective service files. The question presented is whether it was proper for the selective service boards to consider these advisory recommendations in classifying respondents.

STATUTE AND REGULATIONS INVOLVED

The pertinent provisions of the Selective Training and Service Act and of the Selective Service

Regulations are set forth in the Appendix, *infra*, pp. 29–34.

STATEMENT

Each respondent registered under the Selective Training and Service Act and thereafter claimed exemption from military service as a *bona fide* student in a recognized theological school preparing himself to be a rabbi in the Jewish religion. Their claims were ultimately rejected and each was classified I–A and inducted into the Army. Shortly thereafter separate petitions for writs of habeas corpus were filed on their behalf in the United States District Court for the District of New Jersey seeking their release from military custody on the ground that their local boards had arbitrarily and capriciously denied them classification in IV–D as students preparing for the ministry (No. 947, R. 3–7; No. 948, R. 2–4). Petitioner filed a return (No. 947, R. 8; No. 948, R. 5) in each case and hearings were had in which the selective service file of each respondent was received in evidence. Thereafter the court entered findings of fact and conclusions of law adverse to respondents and ordered the writs of habeas corpus dismissed (No. 947, R. 37–39; No. 948, R. 55–59).

Each respondent took an appeal to the Circuit Court of Appeals for the Third Circuit and that court reversed the judgments of the district court and ordered respondents released from military custody. Relying on *United States ex. rel. Levy* v. *Cain*, 149 F. 2d 338 (C. C. A. 2), the

court below held, in a single *per curiam* opinion, that it was improper for the selective service boards to consider the statement and recommendations of the advisory panel on theological questions established by the Selective Service System to the effect that respondents were not bona fide students preparing for the ministry.

The pertinent facts relating to respondents' selective service classifications, as revealed by their respective selective service files, may be summarized as follows:

Horowitz.—Respondent registered under the Act and in January 1941, he filed his questionnaire and an accompanying statement in which he said that he was a student at the College of the City of New York preparing for a career as a psychiatric social worker,[1] and that if he was selected for induction he desired his induction to be postponed until the close of the 1941 academic year. In this statement he said, in part:

> * * * My request is that you defer my drafting until February, 1943. At that time I will have been graduated from college. I will have been able to save enough money for graduate work and some to spare to tide me over after my year of service. I would have had time to become

[1] The college authorities advised the local board that Horowitz was in "substantially full time attendance" at the college.

a known cantor who could spare a year's absence. And when I returned, I would be able to seek employment in my field with a bachelor's degree in my pocket—employment which I could not expect without the diploma. In other words if you take me now, you practically negate my possibilities to attain the position I seek in life, namely, a psychiatric social worker.

On May 10, 1941, Horowitz was physically examined and found qualified for general military service. Less than two weeks later the local board was advised that Horowitz had been enrolled in the Rabbinical Seminary of America* for the scholastic term beginning in September 1941.

On July 1, 1941, the academic year at City College having ended, Horowitz was classified I–A, and on his appeal to the board of appeal he was again classified I–A on August 25, 1941. In the meantime he had claimed classification as a student preparing for the ministry, and he undertook to supply the local board with additional evidence to support this claim. In an affidavit dated July 16, 1941, Horowitz stated that before May 1941, he "had not disclosed my intention to become a rabbi because I had no concrete facts to present; I had merely hopes." On November 2, 1941, Horo-

*An acknowledged seminary of theological study recognized by the Selective Service System.

witz was classified IV–D by the local board, and he retained this classification until May 1944.[4]

In April 1944, the Director of Selective Service for New York City undertook a review of Horowitz' selective service file and in the course of that review he was requested to appear before the advisory panel on theological classifications (see *infra*, pp. 20–21). A hearing was had before the panel on May 2, 1944, at which Horowitz furnished additional evidence and full inquiry was made into his claim that he was a *bona fide* student preparing for the ministry. A transcript of this hearing was made and was sent to the local board on May 10, 1944, This letter transmitting the transcript, signed by the Chief, Legal Division, New York City Headquarters, advised the local board that:

> There is returned herewith the cover sheet and file of the above named registrant

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[4] On June 12, 1942, relator filed his Selective Service Occupational Questionnaire in which he stated that he was taking a course in rabbinical studies at the Rabbinical Seminary of America, which he expected to complete in 1947 or 1948; and that he was taking a course in Bachelor of Social Science at the College of the City of New York which he expected to complete in June 1944. Relator stated that the job for which he was best fitted was Group Worker for Children, and that he had four years experience in such work. Under "duties of job for which you are best fitted" he stated: "I have supervised as a volunteer worker children's clubs and have served as a leader of an individual club as well as director of all." Under "job for which you are next best fitted" he stated "None". He stated that his present job was that of student and under Professional and Scientific Workers he listed himself as a Social worker.

submitted to this Headquarters for administrative review.

On May 2nd the registrant appeared before the appropriate division of our advisory panel on theological classifications, composed of eminent clergymen and laymen. After reviewing the file and examining the registrant, and upon consideration of all the circumstances, the panel voted to recommend that registrant's status does not warrant his classification in Class IV–D. A transcript of the evidence taken at the hearing is enclosed herewith.

It is requested, therefore, that the Local Board reopen and reconsider the registrant's classification of Dec. 2nd, 1943 in the light of the additional evidence presented and advise this Headquarters of the action taken in the matter.

Of course, while the Local Board should give careful consideration to the recommendation of the advisory panel, formal determination of the registrant's classification must rest with the Board itself or the appropriate appeal agency.

* * * * *

Shortly thereafter there was also forwarded to the local board a statement for the record, dated May 2, 1944, which had been prepared by the advisory panel. The local board was directed that "The statement should be added to the registrant's file and considered together with the other information of record in determining the registrant's classifica-

tion." The panel's statement contained a general discussion of educational practices in the field of Jewish education and it spelled out the considerations which the panel regarded as significant in considering Horowitz' claim, as follows:

> Registrant's claim for exemption is predicated upon his status as a student of the Rabbinical Seminary of America. That institution is one of several talmudical academies in this area offering courses based upon intensive study of the talmudical tractates, commentaries and codes. While these courses embrace the subject matter upon which candidates for traditional rabbinic certification are examined, students taking such courses are not necessarily preparing for the ministry.
>
> Orthodox tradition has always encouraged advanced study of talmudic literature, both privately and at academies instituted for that purpose, irrespective of the specific occupational objective of those engaged in such study, and all courses offered by these academies are open to qualified students without regard to the individual student's specific intention to prepare for a career of service in the rabbinate.
>
> Thus, a student ultimately intending to enter business or a profession, or some non-rabbinic activity in the field of religion, may be enrolled in the same courses attended by other students who are specifically concerned with preparation for the rabbinate. It is, therefore, essential for

purposes of Selective Service classification to determine in each individual case the purpose which the registrant has in mind in pursuing his course of study.

* * * * *

Accordingly, this panel is of the opinion that proper evaluation of the registrant's status must take into consideration the character of the institution he is attending and the relevant circumstances present on the record and disclosed at the examination before this panel. Furthermore, in seeking to assess the sincerity of the registrant's declared purpose, due weight must be given to the registrant's manner of answering questions, his demeanor, presence or absence of inadequately explained inconsistencies in his statements, and in general, the total impression accruing relevant to registrant's candor, trustworthiness and integrity.

In the present case the registrant described himself in his questionnaire (subscribed January 24, 1941) as a teacher, cantor and student preparing for psychiatric social work. In the four page statement filed with his questionnaire, registrant gives no indication whatever that he plans to prepare for the ministry, but on the contrary, refers in very emphatic terms to his "looking forward to making a success of my career—a career dedicated to social service." He also refers to his anxiety that "I will lose all my contacts which are so necessary to make me a successful cantor" and

to the fear that "if you take me now, you practically negate my possibilities to attain the position I seek in life, namely, a psychiatric social worker." In subsequent statements submitted to the local board and in his examination before this panel, registrant represents that he is a student preparing for the orthodox rabbinate, that he had decided on that career as early as 1939, and that for some four years prior to that date he had planned to prepare for a career in the conservative rabbinate.

In view of his declared aspirations as of January, 1941, and the many inconsistencies in his explanation of the reasons for the omission at that time of any reference to his ministerial ambitions, and the rather indifferent and unsystematic manner in which he sought to prepare himself for his subsequently professed objective, this panel is not convinced that his formal entry upon a course of study in the Rabbinical Seminary of America in September, 1941, and his continued attendance at that institution since that date was prompted by a sincere intention to prepare for a career in the rabbinate. On the contrary, an analysis of the history of his case taken together with an appraisal of the registrant's reliability and candor, as disclosed by our examination, impels the conclusion that registrant's attendance at the seminary has been motivated by the desire to secure a basis for

exemption from training and service under Selective Service law.

The local board classified Horowitz I–A on May 11, 1944, and he was thereafter, at his request, given a hearing before the local board. As a result of the hearing the local board referred Horowitz's selective service file to Rabbi Henry A. Schorr, who formerly had been chairman of another local board in New York City, for an advisory recommendation. Rabbi Schorr recommended that Horowitz be classified IV–D, and the local board did so on June 1, 1944.

On August 10, 1944, the local board held a hearing concerning Horowitz' case "to refresh our records and inquire into your present status," and as a result, Horowitz was again classified I–A. He thereafter requested and was accorded another hearing before the local board at which he submitted additional documentary evidence in support of his claim to a IV–D classification. The board considered the new evidence, but concluded that it did not merit a change in classification. Horowitz appealed to the board of appeal, which on November 14, 1944, classified him I–A by a vote of 5 to 0. On two occasions thereafter Horowitz requested the local board to reopen his classification and he submitted additional evidence in support of his claim. The local board examined the new evidence, but on both occasions it concluded that the additional evidence did not warrant reopening the classification.

On February 12, 1945, New York City Headquarters wrote to the appeal board as follows:[4]

> On November 14, 1944, your Board classified the above named registrant in Class I–A by a vote of 5–0, and the registrant is now scheduled to report for induction on February 15th.
>
> The file in this case contains a communication from this Headquarters, dated May 10, 1944, reporting to the Local Board the recommendation of our Advisory Panel on Theological Classifications, after hearing in the matter, that registrant's status does not warrant a IV–D classification.
>
> For your information, it is stated that the following members of the Advisory Panel were present at the hearing in this case and joined in the recommendation:
>
> Hon. Jonah J. Goldstein, Judge of the Court of General Sessions in New York County; Member of the Board of Directors of the Jewish Education Committee; Trustee at large of the Federation of Jewish Charities; and formerly a member of the Administrative Committee of the Zionist Organization of America.
>
> Hon. William S. Evans, Justice of the City Court of the City of New York; Member of the Jewish Education Committee; Member of the B'Nai Brith; and Member of Federation for Support of Jewish Philanthropic Societies.

[4] A similar letter was sent to the local board.

Hon. E. Ivan Rubenstein, Justice of the Supreme Court of the State of New York; Member of the United Synagogue of America; Past President and Member of the Board of Trustees of Temple Beth El, Manhattan Beach; and Member of the Continuing Conference of the Jewish Theological Seminary of America.

While none of the panel's rabbinical members were present at the hearing in question, this Headquarters is of the opinion that the members who attended were fully qualified to pass upon the issues presented.

However, if the Board of Appeal, or any member thereof, considers the information with regard to the identity of the panel members voting in the present case as warranting reconsideration of the registrant's classification by your Board, it is requested that this Headquarters be advised accordingly, in order that appropriate administrative action may be taken at this time to secure such reconsideration.

Both the local board and the appeal board advised City Headquarters that there was no occasion for reopening the classification. The board of appeal, which had finally classified Horowitz, stated that the board had considered the information concerning the panel's membership and that "we have once again unanimously agreed that the registrant's status does not warrant a IV–D classification."

Respondent was inducted into the armed forces on February 15, 1945.

Samuels.—This respondent registered with local board No. 193, Brooklyn, New York, on February 16, 1942, and on July 23, 1942, he filed his selective service questionnaire. In that document he stated that he was 21 years of age and that he had had two years of high school education; that he was a student at the Mesifta Theological Seminary, preparing for the rabbinate; and that since 1940 his regular occupation was that of "general clerk" in a store. In an occupational questionnaire, Samuels stated that he was employed by the Eden Textile Company and that for the past two years his duties were to "receive, ship, check, stock, and sell cotton goods." He also stated in that document that the job for which he was best fitted was that of a "Hebrew school teacher and spiritual leader."

In response to an inquiry from the local board, the registrar of the Mesifta Talmudical Seminary advised the board that Samuels "entered our Rabbinical Division in September 1937 and will probably graduate in 1945"; "Mr. Samuels has been attending our school system since the age of six. He graduated from our 8 year elementary course and from our 4 year pre-rabbinical course. Upon his completion of the latter division he was admitted to our Rabbinical division in September 1937. After having attended for two years he left the school in

June 1939 to seek employment.[5] In September 1941 he returned to our evening division and in July 1942[6] he was transferred to the day session." On August 29, 1942, Samuels was classified IV–D.

In May 1944, Samuels was given a physical examination and was found acceptable for general military service. Thereafter, on June 21, 1944, he had a hearing before the Advisory Panel of Theological Classifications on his claim to classification as a student preparing for the ministry. The stenographic transcript of the hearing shows that Samuels stated to the panel, *inter alia*, that he expected to graduate from the seminary in 1945; that he left school in October 1939 because of ill health, but that in January 1940 he took a job as a stock clerk; that he worked in this capacity until July 1942; that at that time he returned to the school as a full-time student, even though the school summer vacation period started on July 15; and that he became a full-time student at about the time he filed his selective service questionnaire.

The Theological Panel prepared a "Statement for the Record," as in the *Horowitz* case, in which

[5] More than two years later, at a time when Samuels' classification was under consideration, the registrar of the Seminary advised the local board that he had been mistaken in stating that Samuels left school in 1939 "to seek employment"; that, instead, he left school because of ill health.

[6] It was in July 1942, that Samuels received his selective service questionnaire from the local board.

it concluded that Samuels was not "preparing in good faith for a career of service in the practicing rabbinate." The transcript of the hearing, together with the Panel's statement and recommendation, were then forwarded to the local board with the admonition that, "while the Local Board should give careful consideration to the recommendation of the advisory panel, the responsibility of determining the registrant's classification must rest with the Local Board itself, or the appropriate agency of appeal."

The local board reclassified Samuels from IV–D to I–A on August 22, 1944. He thereafter submitted additional evidence and requested a hearing before the local board, which he had on September 26, 1944. He had a second hearing on October 4, 1944, at which he submitted more evidence in support of his claim. The stenographic transcript of the second local board hearing reveals that Samuels claimed that the transcript of the hearing before the theological panel was inaccurate; that the local board permitted him to correct the alleged inaccuracies; and that at the conclusion of the hearing the local board advised him that "the Board will give your case every consideration and we are not bound by the questions put to you by the Panel. We are considering the facts as they are now before us and will consider also the deposition submitted to us by the Panel together with the additional information you have given us." On

October 5, 1944, the local board ordered that Samuels be continued in I–A, and on his appeal to his board of appeal, he was again classified I–A.[1]

A few days after the decision of the board of appeal, Samuels filed additional supporting documents with the local board and requested that his classification be reopened. The associate government appeal agent thereupon examined Samuels' file, including the newly submitted evidence, and he advised the local board that "I fail to find anything in the record that would justify reopening of the case or disturbing the I–A classification." The local board again held a hearing on Samuels' claim, at which he was present. At the hearing, Samuels was advised that the additional evidence which he had submitted was merely corroborative and did not of itself justify reopening the classification. One of the members of the local board stated to Samuels that he had investigated his claim that the theological panel had acted hastily and that he had learned that the members of the panel "are qualified men, well versed in the field that the registrant was being interviewed about." Samuels advised the local board that of his own volition he had appeared before a committee (not connected with the selective service system) rep-

[1] On the appeal, there was included in Samuels' file his "Statement on Appeal", in which he summarized his reasons for urging the board of appeal to upset the classification given him by his local board.

resenting the Union of Orthodox Rabbis and that the committee concluded that he was a student preparing in good faith for the ministry.' One member of the local board noted for the file that he was not persuaded by Samuels' evidence and that "registrant's demeanor was not favorable." On November 14, 1944, the request to reopen the classification was denied, and on December 9 Samuels was ordered to report for induction on December 20, 1944. His subsequent request for a six months' deferment was denied, and he was inducted into the Army on December 26, 1944.

SPECIFICATION OF ERRORS TO BE URGED

The circuit court of appeals erred:

1. In holding that "the interjection of the statement and recommendation of the 'advisory panel' into the proceedings of the local boards vitiated those proceedings and rendered the relators' reclassification and induction invalid."

2. In reversing the judgments of the district court and ordering respondents discharged from military custody.

REASONS FOR GRANTING THE WRIT

The circuit court of appeals, in our view, has incorrectly decided a question of substantial importance in the administration of the Selective Training and Service Act, concerning which there

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[1] It does not appear whether the committee had before it the same facts as were before the selective service boards and the theological panel.

exists a conflict among the circuit courts of appeals and the federal district courts.

Section 5 (d) of the Selective Training and Service Act (*infra*, p. 29) exempts from military service registrants who are "regular or duly ordained ministers of religion" and "students who are preparing for the ministry in theological or divinity schools recognized as such for more than one year prior to" September 16, 1940. And Section 10 (a) (2) confers on the local boards established within the Selective Service System the "power within their respective jurisdictions to hear and determine, subject to the right of appeal to the appeal boards herein authorized, all questions or claims with respect to inclusion for, or exemption or deferment from, training and service under this Act of all individuals within the jurisdiction of such local boards."

The question which the cases present is whether a selective service board abdicates its function under Section 10 (a) (2) of the Act where it refers a registrant's claim to a IV–D classification to an advisory panel on theological classifications and considers the recommendation of that panel as evidence, together with all the other evidence in the registrant's file, in classifying him.

1. *The Function of the Advisory Panel on Theological Classifications in the Selective Service System.*—We are advised by the Selective Service System that the State Director of Selective Service for New York City established in January 1943

a panel of prominent laymen and rabbis[9] of the Jewish faith to assist the local boards in that area in investigating claims by registrants to classification in IV–D as ministers or students preparing for the ministry and in evaluating the technical theological data involved.[10] In essence, the panel was created to perform in the field of theological classifications the same function which the Hearing Officer of the Department of Justice performs in cases of conscientious objectors (see Sec. 5 (g), *infra*, pp. 29–30), i. e., to investigate the registrant's claim, interview him, analyze the significant facts pertaining to the claim, and to make an advisory recommendation to the selective service boards concerning the merits of the claim. Among the cases arising which prompted the creation of the panel were those involving the question whether the registrant was in fact "preparing for the ministry" at the institution he was attending.[11]

[9] The members of the panel are uncompensated members of the Selective Service System, each of whom has taken an oath of office as required by Section 602.4 of the Selective Service Regulations (*infra*, p. 31).

[10] Similar groups were later established for certain other faiths.

[11] Attendance at a theological school, in many instances, is not limited to students who are preparing for the ministry. For example, students preparing to be teachers in Hebrew Schools very often attend theological seminaries for their educational training. See *United States ex rel. Goodman v. Hearn*, No. 11456, C. C. A. 5, decided January 15, 1946.

In practice, the panel functions in the manner shown by the records in these cases. After a registrant who claims a IV-D classification has submitted his evidence to the local board, the file is referred to the panel for an advisory recommendation if any question exists as to the merits of his claim. It may be referred to the panel by the local board or at the request of the City Director of Selective Service. The registrant is given a hearing before the panel, at which he is permitted to furnish additional evidence and to explain the basis for his claim to exemption. A stenographic transcript is made of the hearing and that transcript, together with a recommendation of the panel, is made a part of the registrant's selective service file. The local board is specifically advised in each case that the recommendation is advisory only and that it is the function of the local board to classify the registrant.

2. *The Question is Important and There is a Conflict of Decisions.*—a. The same question which is involved in the present cases was decided against the registrant in *United States ex rel. Goodman* v. *Hearn*, No. 11456, decided January 15, 1946, by the Circuit Court of Appeals for the Fifth Circuit. As in these cases, it was contended in the *Goodman* case that the local board abdicated its functions by considering the advisory recommendation of the panel on theological classifications. And, again, as in these cases, the

contention was predicated upon the decision of the Circuit Court of Appeals for the Second Circuit in *United States ex rel. Levy* v. *Cain*, 149 F. 2d 338, where a registrant was ordered discharged from the Army because his classification was founded upon the recommendation of the advisory panel.[12] In an opinion by Judge Sibley, the Circuit Court of Appeals for the Fifth Circuit expressly disagreed with the decision below and with the decision of the Circuit Court of Appeals for the Second Circuit in the *Levy* case. The court carefully examined the considerations underlying the use of the theological panel and concluded that the mere fact that the local board considered the recommendation of the theological panel did not vitiate the registrant's classification. In rejecting the view of the court below, the Circuit Court of Appeals for the Fifth Circuit said:

> Appellant rests heavily on *United States ex rel. Levy* v. *Cain*, 149 F. (2) 338, in the Second Circuit, followed in the Third Circuit in *United States ex rel. Samuels vs. Pearson*, — Fed. —, and *United States*

[12] Compare *United States ex rel. Trainin* v. *Cain*, 144 F. 2d 944 (C. C. A. 2), certiorari denied, 323 U. S. 795. The registrant in that case contended, in the circuit court of appeals and upon petition for a writ of certiorari, that his classification was illegal because the local board considered the recommendation of the advisory panel. The circuit court of appeals flatly rejected the contention, and certiorari was denied. The subsequent ruling of the same court in the *Levy* case qualifies the earlier decision in the *Trainin* case.

ex rel. Horowitz v. *Pearson*, — Fed. (2) —, in which on habeas corpus the use by the local boards of the Theological Panel above mentioned was held to vitiate the classifications made. We do not agree with all that was said in these opinions. This Theological Panel, not authorized by statute or regulation, seems to have been set up by Selective Service Headquarters for New York City, to give the local boards of the vicinity information and advice on the matter of these ministerial exemptions, there being many kinds of religions and ministers and students in that crowded population with which members of the local boards might not be familiar. We can see that such advice from well-informed members of the faiths in question might both help and speed just classification; and such was, we think, its purpose in this case. * * *

* * * * * *

It is not according to general court practice to take and consider opinions of outsiders on the question at issue, and there is danger that too much weight may be given to them. But even in courts the practice is not unknown. * * * We do not think that a Local Board necessarily abdicates its function or vitiates its decisions on deferments and exemptions by seeking opinions which it regards as reliable. It must, of course, as this Local Board was advised, make the final decision, and fairness and the regulations require that such

outside information be put in writing in the file where the registrant may see and explain or deny it. That was all done in this case. The names of the panel members were not in the file, but in each instance two were known to registrant and all could have been learned easily. The Board wrote registrant that it had made its own classification on the hearing before it. There is no good ground for saying it left the decision to the panel.

The same conflict of decisions exists in the federal district courts. Compare *United States ex rel. Rubin* v. *Magruder*, 55 F. Supp. 947 (D. R. I.), in which the court held, *inter alia*, that the selective service board was improperly influenced by the panel's recommendation, with *United States ex rel. Isserоff* v. *Cain*, 57 F. Supp. 715 (E. D. N. Y.), *United States ex rel. Steinberg* v. *Graham*, 57 F. Supp. 938 (E. D. Ark.), *United States ex rel. Goodstein* v. *Mallon*, 61 F. Supp. 671 (D. Md.), and *United States ex rel. Yaroslawitz* v. *Fales*, 61 F. Supp. 960 (S. D. Fla.), where the courts sustained selective service classifications based in part upon recommendations of the panel. See also note 12, *supra*, p. 22.

b. We think that the decision of the Circuit Court of Appeals for the Fifth Circuit in the *Goodman* case represents the sounder view. As that court said, "We do not think that a Local Board necessarily abdicates its function or vitiates its decisions on deferments and exemptions by

seeking opinions which it regards as reliable. It must, of course, as this Local Board was advised, make the final decision, and fairness and the regulations require that such outside information be put in writing in the file where the registrant may see and explain or deny it."

Neither the Selective Training and Service Act nor the Selective Service Regulations (see Sec. 623.2, *infra*, pp. 32–33) place limits on the sources from which the local boards may seek information as a basis for classifying a registrant. So long as the information is relevant to the inquiry and is placed in the file where the registrant may examine it and reply to it, we think it is immaterial whether the information comes from the registrant, local board investigators, or, as in these cases, from an expert advisory body established within the Selective Service System. In habeas corpus cases such as these, we believe the registrant must show more than that the local board considered the recommendation of the advisory panel or that the recommendation did not satisfy the limitations imposed by the *Levy* decision.[13] He bears the burden of establishing that the local board did not consider all the evidence before it in making its classification; that, in fact, the local board abdicated its responsibilities by blindly ac-

[13] The *Levy* decision did not purport to ban all use of the advisory panel, but limited its use in two respects: "The personnel of the 'panel' must be disclosed to the registrant so that he may effectively challenge it; and the answers must be limited to ecclesiastical questions" (149 F. 2d at 341).

cepting the recommendation of the theological panel as the basis for classification.

In neither the *Horowitz* nor the *Samuels* case does the local board file reveal anything of this character. To the contrary, the files show that every item of evidence which respondents offered was received by the selective service boards and considered by them; that the boards accepted the recommendations of the theological panel as advisory only; that respondents had access to the recommendations and had full opportunity to challenge them and to adduce additional evidence refuting the panel's recommendations; and that there is evidence which supports the selective service boards' rejection of respondents' claims to classification in IV–D. Nothing in the files, or in the evidence adduced by respondents at the habeas corpus hearings, permits the conclusion that the selective service boards departed either from the Selective Training and Service Act or the Selective Service Regulations in classifying respondents.

c. The question involved in these cases is of substantial importance in the administration of the Selective Training and Service Act. For the problem affects not only the future classification of registrants, but it also affects the validity of the classifications of hundreds of registrants who are now in the armed forces and who might be entitled to release on habeas corpus if the doctrine of the court below is correct. Throughout the war

it has been the practice of the selective service boards to seek advisory recommendations from experts on questions concerning which the local boards desire advice. Thus, for example, in determining whether a physician is essential to the community and should be deferred, the boards have uniformly sought a recommendation from representatives of the local medical association. In determining whether registrants should be deferred as essential farm workers, the boards have sought the recommendations of the local County War Boards established by the Department of Agriculture, concerning the registrants' agricultural activities and the necessity of deferring them.[14] In dealing with individual claims to classification in IV–D the boards, as in *Horowitz'* case, have called in a minister of religion of the particular faith involved to advise the board concerning the religious aspects of the case. Numerous similar situations exist in which advisory recommendations, like these in the present cases, were considered by the selective boards. If the decision below is correct, a serious doubt will have been cast on the validity of the selective service classifications of many men who were so classified and who have been inducted and are presently serving in the armed forces.

[14] That this practice is permissible has been twice recognized by the Circuit Court of Appeals for the Ninth Circuit in decisions which, in principle, thus conflict with the decision below. *Sullivan* v. *Swatzka*, 148 F. 2d 965, certiorari denied October 15, 1945; *Cramer* v. *France*, 148 F. 2d 801.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for writs of certiorari should be granted.

J. HOWARD MCGRATH,
Solicitor General.

MARCH 1946.

APPENDIX

The Selective Training and Service Act of 1940 (54 Stat. 885, 50 U. S. C. App. 301, et seq.) provides, in part, as follows:

> SEC. 5. * * * (d) Regular or duly ordained ministers of religion, and students who are preparing for the ministry in theological or divinity schools recognized as such for more than one year prior to the date of enactment of this Act, shall be exempt from training and service (but not from registration) under this Act.
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> * * * * * *
>
> (g) * * * Any such person claiming such exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board provided for in section 10 (a) (2). Upon the filing of such appeal with the appeal board, the appeal board shall forthwith refer the matter to the Department of Justice for inquiry and hearing by the Department or the proper agency thereof. After appropriate inquiry by such agency, a hearing shall be held by the Department of Justice with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board (1) that if the objector is inducted into the land or naval forces under

this Act, he shall be assigned to noncombatant service as defined by the President, or (2) that if the objector is found to be conscientiously opposed to participation in such noncombatant service, he shall in lieu of such induction be assigned to work of national importance under civilian direction. If after such hearing the Department finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall give consideration to but shall not be bound to follow the recommendation of the Department of Justice together with the record on appeal from the local board in making its decision. Each person whose claim for exemption from combatant training and service because of conscientious objections is sustained shall be listed by the local board on a register of conscientious objectors.

* * * * * *

SEC. 10. * * * (b) The President is further authorized, under such rules and regulations as he may prescribe, to delegate and provide for the delegation of any authority vested in him under this Act to such officers, agents, or persons as he may designate or appoint for such purpose or as may be designated or appointed for such purpose pursuant to such rules and regulations as he may prescribe.

(c) In the administration of this Act voluntary services may be accepted. * * *

The Selective Service Regulations provide:

602.2 *Voluntary services.* Voluntary services in the administration of the selective service law may be accepted and should be encouraged.

602.3 *Uncompensated services.* The services of registrars, members of local boards, members of boards of appeal, members of medical advisory boards, members and associate members of advisory boards for registrants, government appeal agents and associate government appeal agents, examining physicians and examining dentists, reemployment committeemen, interpreters, and all other persons volunteering their services to assist in the administration of the selective service law shall be uncompensated, and no such person shall accept remuneration from any source for services rendered in connection with selective service matters.

602.4 *Oath of Office and Waiver of Pay or Compensation (Form 21).* (a) Every person who undertakes to render voluntary uncompensated service in the administration of the selective service law shall, before he enters upon his duties, execute an Oath of Office and Waiver of Pay or Compensation (Form 21).

(b) Every person who undertakes to render compensated service in the administration of the selective service law shall, before he enters upon his duties, execute the Oath of Office portion of Form 21, but shall not execute the Waiver of Pay or Compensation portion of Form 21.

(c) When executed in the manner herebefore provided, the Oath of Office and Waiver of Pay or Compensation (Form 21) shall be sent to the State Director of Selective Service for filing.

* * * * *

622.44 *Class IV–D: Minister of religion or divinity student.*

(a) In Class IV–D shall be placed any registrant who is a regular or duly or-

dained minister of religion or who is a student preparing for the ministry in a theological or divinity school which has been recognized as such for more than 1 year prior to the date of enactment of the Selective Training and Service Act (September 16, 1940).

(b) A "regular minister of religion" is a man who customarily preaches and teaches the principles of religion of a recognized church, religious sect, or religious organization of which he is a member, without having been formally ordained as a minister of religion; and who is recognized by such church, sect, or organization as a minister.

(c) A "duly ordained minister of religion" is a man who has been ordained in accordance with the ceremonial ritual or discipline of a recognized church, religious sect, or religious organization, to teach and preach its doctrines and to administer its rites and ceremonies in public worship; and who customarily performs those duties.

623.2 *Information considered for classification.* The registrant's classification shall be made solely on the basis of the official forms of the Selective Service System and such other written information as may be contained in his file; provided, that the local board shall proceed with the registrant's classification and classify him whenever (1) he has failed or hereafter fails to return his Selection Service Questionnaire (Form 40) within the time allowed by section 621.2, or (2) he has been separated from the land or naval forces of the United States and the local board determines that he may be classified properly without requiring him to complete and return a Se-

lective Service Questionnaire (Form 40), or (3) he has failed or hereafter fails to provide the local board with any other information concerning his status which he is requested or required to furnish. Oral information should not be considered unless it is summarized in writing and the summary placed in the registrant's file. Under no circumstances should the local board rely upon information received by a member personally unless such information is reduced to writing and placed in the registrant's file.

626.1 *Classification not permanent.* (a) No classification is permanent.

(b) Each classified registrant and each person who has filed a request for the registrant's deferment shall, within 10 days after it occurs, report to the local board in writing any fact that might result in the registrant being placed in a different classification. Any other person should, within 10 days after knowledge thereof, report to the local board in writing any such fact.

(c) The local board shall keep informed of the status of classified registrants. Registrants may be questioned or physically or mentally reexamined, employers may be required to furnish information, police officials or other agencies may be requested to make investigations, and other steps may be taken by the local board to keep currently informed concerning the status of classified registrants.

626.2–1 *When registrant's classification shall be reopened and considered anew.* The local board shall reopen and consider anew the classification of a registrant upon the written request of the State Director of Selective Service or the Director of Selec-

tive Service and upon receipt of such request shall immediately cancel any Order to Report for Induction (Form 150) or any Order to Report for Work of National Importance (Form 50) which may have been issued to the registrant; provided that after a registrant has left the local board for delivery pursuant to an Order to Report for Work of National Importance (Form 50), the local board shall reopen and consider anew the classification of such registrant only upon the written request of the Director of Selective Service.

U. S. GOVERNMENT PRINTING OFFICE: 1940